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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**MOTION PURSUANT TO 11 U.S.C. § 363(b)
AUTHORIZING DEBTORS TO PAY THE
FEES AND EXPENSES OF SIMPSON
THACHER & BARTLETT LLP AS
COUNSEL TO THE INDEPENDENT
DIRECTORS OF PG&E CORP.**

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the Lead Case,
No. 19-30088 (DM).*

Date: April 24, 2019
Time: 9:30 a.m. (Pacific Time)
Place: United States Bankruptcy Court,
Courtroom 17, 16th Floor
San Francisco, CA 94102

1 PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the
2 “**Utility**”), as debtors and debtors in possession (collectively, “**PG&E**” or the “**Debtors**”) in the
3 above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), submit this Motion (this “**Motion**”),
4 pursuant to section 363 of title 11 of the United States Code (the “**Bankruptcy Code**”), authorizing
5 the Debtors to pay the fees and expenses of Simpson Thacher & Bartlett LLP (“**Simpson Thacher**”
6 or the “**Firm**”) as counsel to the Independent Directors of PG&E Corp. (the “**Independent**
7 **Directors**”), effective as of the Petition Date (as defined below).

8 A proposed form of order approving the relief requested in the Motion is annexed hereto
9 as **Exhibit A** (the “**Proposed Order**”). The Motion is supported by the *Declaration of Michael*
10 *H. Torkin in Support of the Motion Pursuant to 11 U.S.C. § 363(b) Authorizing Debtors to Pay*
11 *the Fees and Expenses of Simpson Thacher & Bartlett LLP as Counsel to the Independent*
12 *Directors of PG&E Corp.* (the “**Torkin Declaration**”).

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. JURISDICTION**

4 The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334,
5 the *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General Order 24
6 (N.D. Cal.), and Rule 5011-1(a) of the Bankruptcy Local Rules for the United States District Court
7 for the Northern District of California (the “**Bankruptcy Local Rules**”). This is a core proceeding
8 pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408
9 and 1409.

10 **II. BACKGROUND**

11 On January 29, 2019 (the “**Petition Date**”), the Debtors commenced with the Court
12 voluntary cases under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their
13 businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and
14 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in either of the Chapter
15 11 Cases. The Debtors’ Chapter 11 Cases are being jointly administered for procedural purposes
16 only pursuant to Bankruptcy Rule 1015(b).

17 On February 12, 2019, the United States Trustee (the “**U.S. Trustee**”) appointed an Official
18 Committee of Unsecured Creditors (the “**Creditors Committee**”). On February 15, 2019, the U.S.
19 Trustee appointed an Official Committee of Tort Claimants (the “**Tort Claimants Committee**”
20 and, together with the Creditors Committee, the “**Committees**”).

21 Additional information regarding the circumstances leading to the commencement of the
22 Chapter 11 Cases and information regarding the Debtors’ businesses and capital structure is set
23 forth in the *Amended Declaration of Jason P. Wells in Support of the First Day Motions and Related*
24 *Relief* [Docket No. 263] (the “**Wells Declaration**”).

25 **III. RETENTION OF SIMPSON THACHER BY THE INDEPENDENT DIRECTORS**

26 Simpson Thacher has been providing separate advice to the Independent Directors on a
27 range of unique matters for more than one year. Given the unprecedented issues facing the
28 Independent Directors, including significant regulatory, judicial, and shareholder scrutiny, it is

important to both the Independent Directors and the Debtors that the Independent Directors continue to receive this advice.

Simpson Thacher was first engaged in December 2017 to advise the Independent Directors regarding legislation concerning dividends and related issues. Simpson Thacher also has been representing the Independent Directors regarding alleged breaches of fiduciary duties and other claims arising out of the 2017 and 2018 wildfires — including in pending derivative litigation which the plaintiff has asserted will not be stayed during the Chapter 11 Cases. *See* Plaintiff’s Response to Nominal Defendants, PG&E Corporation, and Pacific Gas and Electric Company’s Notice of Stay of Proceedings, *Bowlinger v. Chew et al.*, No. CGC-18-572326 (Supp. Ct. S.F. City and Country, Feb. 5, 2019). In addition, Simpson Thacher continues to advise the Independent Directors concerning their fiduciary duties.

There are also a number of ongoing inquiries, none of which will be stayed during these Chapter 11 Cases, that involve the interests of the Independent Directors:

- The California Public Utility Commission’s (CPUC) Safety and Enforcement Division’s Order Instituting Investigation (OII) Concerning the Debtors’ Safety Culture. In 2015, the CPUC instituted an investigation to assess the organizational and governance measures taken by the Board and the Debtors to improve safety. In 2018, the CPUC expanded this investigation to include the Debtors’ corporate governance, structure, and operation.
- CPUC’s OII Concerning Locate & Mark. In December 2018, the CPUC instituted an investigation to assess the adequacy of the Debtors’ “damage prevention and locate and mark programs and practices for its natural gas system,” citing alleged record falsification issues and safety violations by the Debtors from 2012 to 2017.
- Judicial Oversight of the Debtors’ Probationary Period in *United States v. Pacific Gas and Electric*. Under its continuing jurisdiction to oversee the Debtors’ compliance with the conditions of its probation, the U.S. District Court for the Northern District of California has issued several orders in recent months requesting detailed information from the Debtors’ regarding, among other things, potential crimes and Debtors’ role in

1 causing wildfires.

- 2 • District Attorney of Butte County, California. The District Attorney of Butte County,
3 the county where the Camp Fire occurred, has conducted criminal investigations
4 following other wildfires and has stated that his office may conduct similar
5 investigations whenever fatalities are involved. It is possible that the Independent
6 Directors may be drawn into such an investigation, even if only as witnesses.

7 The Independent Directors have publicly announced an independent review of best practices
8 regarding safety and compliance. To avoid any criticism that this review is not sufficiently
9 objective, the Independent Directors need independent counsel.

10 In addition, the Board of PG&E Corp. is seeking to add new directors. Given that the
11 Debtors benefit from having highly qualified directors, it is important that the best candidates feel
12 confident that they are getting appropriate, independent legal advice and that their interests are
13 properly protected.

14 Finally, even under more ordinary circumstances, the independent directors of a debtor need
15 separate legal advice concerning multiple issues. Ensuring that the Independent Directors continue
16 receiving separate, objective legal advice will benefit the Estate during these Chapter 11 Cases.

17 In sum, the dynamic here is highly unusual and it would not be practical or appropriate for
18 the Independent Directors to surrender the benefit of independent advice in connection with the
19 exercise of their fiduciary duties.

20 **IV. SIMPSON THACHER'S QUALIFICATIONS**

21 Simpson Thacher has represented and worked closely with the Independent Directors since
22 2017. As a general matter, Simpson Thacher has extensive experience representing boards in highly
23 challenging circumstances and is well positioned to continue providing necessary independent
24 representation to the Independent Directors. The Independent Directors selected and desire to
25 remain with Simpson Thacher because of its history in this matter and its experience representing
26 the interests of directors in complex situations together with Simpson Thacher's broad experience
27 with bankruptcy, restructuring, and corporate governance matters.

1 Simpson Thacher has worked productively and efficiently alongside the Debtors' advisors
2 in ways that have avoided duplication of effort. Simpson Thacher has not and will not advise the
3 Debtors, and none of the Debtors' lawyers will be positioned to provide independent legal advice
4 to the Independent Directors.

5 **V. SCOPE OF SIMPSON THACHER'S SERVICES AND PROFESSIONAL**
6 **COMPENSATION**

7 The Independent Directors have requested that Simpson Thacher represent and advise them
8 in connection with: these Chapter 11 Cases; regulatory, judicial, and related proceedings concerning
9 conduct of the Debtors or the Independent Directors; shareholder and securities-related issues
10 including litigation; the Independent Directors' review of the Debtors' safety and compliance
11 practices; the exercise of their fiduciary duties including with respect to maximizing the value of
12 the estates; and such other matters as may be requested by the Independent Directors and agreed by
13 Simpson Thacher from time to time.

14 The Debtors are seeking authority to pay the reasonable and undisputed fees and expenses
15 of Simpson Thacher for the services rendered by Simpson Thacher to the Independent Directors.
16 Simpson Thacher's current hourly rates for the attorneys who are expected to continue providing
17 services to the Independent Directors are \$1,325-\$1,640 for partners, \$1,190-\$1,220 for counsel
18 and senior counsel, \$590-\$1,145 for associates and \$265-\$455 for legal paraprofessionals. Simpson
19 Thacher adjusts its rates periodically, typically on January 1 of each year; in addition, rates of
20 associate attorneys typically increase in the fall as associates move up in class seniority.

21 In addition to the hourly rates set forth above, Simpson Thacher customarily charges its
22 clients for costs or expenses incurred. These costs and expenses include, among other things,
23 overnight mail, courier delivery, transportation, computer-assisted legal research, photocopying,
24 airfare, meals, and lodging.

25 Simpson Thacher intends to file and submit monthly invoices (the "**Monthly Invoices**") to
26 the Independent Directors, with copies of the Monthly Invoices (redacted as appropriate) submitted
27 reasonably contemporaneously therewith to (a) the Debtors, (b) counsel for the Debtors, (c) the
28 U.S. Trustee; (d) counsel to any official committees appointed in these Chapter 11 Cases; and (e)

counsel to the administrative agent under the Debtors' debtor in possession financing facility(collectively, the "**Notice Parties**" and each, a "**Notice Party**"). The Debtors will pay all reasonable and undisputed amounts invoiced by Simpson Thacher for fees and expenses pursuant to the following procedures (the "**Payment Procedures**"):

- a) On or after the 30th day of each calendar month, following the month for which compensation is sought, Simpson Thacher will file with the Court and serve on each of the Notice Parties a Monthly Invoice with respect to the fees and expenses incurred during the preceding month.
- b) Each Notice Party shall have fifteen (15) days after a Monthly Invoice is served to review it and, if such Notice Party has an objection to the fees or expenses sought in a particular Monthly Invoice (an "**Objection**"), such party shall, by no later than fifteen (15) days following service of the particular Monthly Invoice (the "**Objection Deadline**"), to file and serve upon Simpson Thacher and the Notice Parties a written notice (the "**Notice of Objection to Invoice**"), setting forth with specificity the nature of the Objection and the amount of fees or expenses at issue.
- c) If no Notice of Objection to Invoice has been timely filed and served upon Simpson Thacher and the Notice Parties by the expiration of the Objection Deadline, or if Simpson Thacher and the objecting Notice Party thereafter consensually resolve any such Objection, the Debtors shall promptly pay, in full, the fees and expenses identified in the Monthly Invoice.
- d) If a Notice of Objection to Invoice has been timely filed and served upon Simpson Thacher and the Notice Parties, the Debtors shall withhold payment of that portion of the Monthly Invoice to which the Objection is directed and promptly pay the remainder of the undisputed fees and expenses to Simpson Thacher.
- e) If a Notice of Objection to Invoice is filed and served upon Simpson Thacher and the Notice Parties, Simpson Thacher and the objecting party will work in good faith to resolve their dispute without resort to the Court.
- f) Any Objections that are not resolved by the parties shall be preserved and presented to the Court at the next available hearing date.

VI. SIMPSON THACHER'S DISINTERESTEDNESS

Because Simpson Thacher will be acting as counsel to the Independent Directors, rather than the Debtors, the Debtors do not believe that Simpson Thacher is a professional whose employment is subject to approval under Section 327 of the Bankruptcy Code. Nevertheless, Simpson Thacher has conducted the customary review of the parties in interest list provided by the Debtors. To the best of the Debtors' knowledge, the partners of, counsel to, and associates of Simpson Thacher do not have any connection with or any interest adverse to the Debtors, their

creditors, or any other party in interest, or their respective attorneys and accountants, except as may be set forth in the Torkin Declaration.

The Debtors have been informed that Simpson Thacher will conduct an ongoing review of these matters, and, if any new facts or relationships that Simpson Thacher believes should be disclosed to this Court and the parties in interest in these cases are discovered, Simpson Thacher will use reasonable efforts to file a supplemental disclosure with the Court and serve such supplemental disclosure on the U.S Trustee.

VII. BASIS FOR RELIEF REQUESTED

The Debtors seek to pay the fees and expenses of Simpson Thacher pursuant to section 363 of the Bankruptcy Code. Section 363(b) of the Bankruptcy Code provides, in relevant part, that a debtor in possession “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363. In considering a section 363(b) motion, courts examine whether the proposed use of property is supported by a sound business reason. *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14, 19-20 (9th Cir. BAP 1988) (citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986)). This examination requires consideration of the “business justification” for the proposed use. *Walter*, 83 B.R. at 19 (“[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business....”). In deciding whether to approve the use of estate property outside of the ordinary course of business, “the bankruptcy judge should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike.” *Id.*; *Continental Air Lines*, 780 F.2d at 1226.

Courts have approved payment of fees and expenses of counsel for a debtor’s independent directors pursuant to section 363. *See, e.g., In re SunEdison, Inc.*, No. 16-10992 (SMB) (Bankr. S.D.N.Y. July 13, 2016) [ECF No. 764] (authorizing debtors to pay fees and expenses of counsel to independent directors on monthly basis); *In re Sabine Oil & Gas Corp.*, No. 15-11835 (SCC) (Bankr. S.D.N.Y. Nov. 5, 2015) [ECF No. 485] (authorizing debtors to advance legal fees to directors in connection with a postpetition investigation); *In re Residential Capital, LLC*, No. 12-

1 12020 (MG) (Bankr. S.D.N.Y. Sept. 27, 2012) [ECF No. 1610] (authorizing payment of fees and
2 expense of counsel to independent directors); *In re Innkeepers USA Trust*, No. 10-13800 (SCC)
3 (Bankr. S.D.N.Y. Nov. 10, 2010) [ECF No. 701] (authorizing payment of fees and expenses of
4 counsel to committee of independent trustees of a board of trustees).

5 Payment of the fees and expenses of Simpson Thacher incurred on behalf of the
6 Independent Directors is consistent with PG&E Corp.'s Articles of Incorporation, which provide:

7 The Corporation is authorized to provide indemnification of agents (as defined in
8 Section 317 of the California Corporations Code) through bylaws, resolutions,
9 agreements with agents, vote of shareholders or disinterested directors, or otherwise
10 in excess of the indemnification otherwise permitted by Section 317 of the California
11 Corporations Code, subject only to the applicable limits set forth in Section 204 of
12 the California Corporations Code.

13 Restated Articles of Incorporation of PG&E Corp. § 6. Identical language is found in the
14 Restated Articles of Incorporation of the Utility § 7.

15 PG&E Corp. adopted the following resolution to implement section 6 of its Articles of
16 Incorporation:

17 Each person who was or is a party or is threatened to be made a party to, or who is
18 involved in any threatened, pending, or completed action, suit, or proceeding, formal
19 or informal, whether brought in the name of this corporation (the "Corporation") or
20 otherwise, and whether of a civil, criminal, administrative, or investigative nature
21 (hereinafter a "proceeding"), by reason of the fact that he or she, or a person of whom
22 he or she is the legal representative, is or was a director or officer of the Corporation,
23 or is or was a director or officer of the Corporation serving at the request of the
24 Corporation (as determined by a committee composed of the General Counsel and
25 the Corporate Secretary) as a director, officer, employee, or agent of another
26 corporation or of a partnership, joint venture, trust, or other enterprise, including
27 service with respect to employee benefit plans, whether the basis of such proceeding
28 is an alleged action or inaction in an official capacity or in any other capacity while
serving as a director or officer, shall, subject to the terms of any agreement between
the Corporation and such a person, be indemnified and held harmless by the
Corporation to the fullest extent permissible under California law and the
Corporation's Articles of Incorporation

Resolution of the Board of Directors of PG&E Corp., Dec. 18, 1996. PG&E Corp. Annual Report,
Exhibit 10.40 (Form 10-K) (Feb. 18, 2005). Identical language is found in the Resolution of the
Board of Directors of the Utility, July 19, 1995. *Id.* Exhibit 10.41.

1 In addition, it is not uncommon outside of bankruptcy for independent directors to engage
2 separate counsel to provide independent advice when a corporation is pursuing strategic initiatives,
3 including restructurings, with such counsel being paid by the corporation.

4 For the reasons explained above, the payment of the reasonable and undisputed fees and
5 expenses of Simpson Thacher for its services to the Independent Directors is fully supported by the
6 applicable indemnification provisions of the Debtors' corporate documents. It is a sound exercise
7 of the Debtors' business judgment to pay these fees and expenses as required.

8 Accordingly, the Debtors believe that paying the ongoing fees and expenses of Simpson
9 Thacher as counsel to the Independent Directors is appropriate and in the best interests of the
10 Debtors and their estates.

11 **VIII. NOTICE**

12 Notice of this Motion will be provided to (i) the Office of the United States Trustee for
13 Region 17 (Attn: James L. Snyder, Esq. and Timothy Laffredi, Esq.); (ii) counsel to the Creditors
14 Committee; (iii) counsel to Tort Claimants Committee; (iv) the Securities and Exchange
15 Commission; (v) the Internal Revenue Service; (vi) the Office of the California Attorney General;
16 (vii) the California Public Utilities Commission; (viii) the Nuclear Regulatory Commission; (ix)
17 the Federal Energy Regulatory Commission; (x) the Office of the United States Attorney for the
18 Northern District of California; (xi) counsel for the agent under the Debtors' debtor in possession
19 financing facility; and (xii) those persons who have formally appeared in these Chapter 11 Cases
20 and requested service pursuant to Bankruptcy Rule 2002. The Debtors respectfully submit that no
21 further notice is required.

22 No prior motion for the relief requested herein has been made by the Debtors to this or any
23 other court.

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WHEREFORE the Debtors respectfully request an order (i) authorizing the Debtors to pay the ongoing fees and expenses of Simpson Thacher as counsel to the Independent Directors, and (ii) granting such other and further relief as the Court deems just and proper.

April 2, 2019

WEIL, GOTSHAL & MANGES LLP
KELLER & BENVENUTTI LLP

By: /s/Jane Kim
Jane Kim

*Proposed Attorneys for Debtors
and Debtors in Possession*